

HONORABLE BENJAMIN H. SETTLE

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

HP TUNERS, LLC, a Nevada limited liability  
company, ) CASE NO. 3:17-cv-05760-BHS  
)  
Plaintiff, ) PLAINTIFF'S RESPONSE TO  
) DEFENDANTS' MOTIONS IN LIMINE  
vs. )  
)  
KEVIN SYKES-BONNETT and SYKED ) **NOTING DATE: OCTOBER 11, 2019**  
ECU TUNING INCORPORATED, a )  
Washington corporation, and JOHN )  
MARTINSON, ) **ORAL ARGUMENT REQUESTED**  
  
Defendants.

Plaintiff, HP Tuners, LLC ("HPT"), hereby makes the following response to Defendants' motions in limine:

**ARGUMENT**

**A. Defendants' Motion to Preclude Detailed Evidence At Trial That Defendant Kevin Sykes-Bonnett Improperly And Unlawfully Generated And Distributed Unauthorized "Keys" Permitting Unauthorized Use Of HP Tuners' Tuning Programs**

HPT is unable to determine whether or not it agrees or objects to Defendants' Motion In Limine (A) as presently set forth.

The essence of Defendants' Motion in Limine (A) is that introduction of any evidence of

1 this nature is unnecessary (and potentially prejudicial to Defendants) insofar as Defendant, Kevin  
2 Sykes-Bonnett (“Sykes-Bonnett”) has admitted, does not deny, and has stipulated to the subject  
3 allegations. To date, however, there have never been any formal stipulation(s) from Defendants  
4 and the factual evidence sought to be excluded forms the basis of liability for the claims asserted.  
5 To the extent Defendants are stipulating to liability on one or more of Plaintiff’s specific causes  
6 of action, HPT may agree with this motion. However, more information is warranted beyond  
7 Defendants’ vague references to informal stipulations.  
8

9 Plaintiff’s position on Defendants’ Motion In Limine (A) is conditioned upon  
10 Defendants’ formal stipulation and admission of liability pertaining to specific causes of action  
11 in Plaintiff’s First Amended Complaint for Injunctive Relief and Damages (Dkt. 35).

12 **B. Defendants’ Motion to Preclude Detailed Evidence At Trial That Defendant**  
13 **Kevin Sykes-Bonnett is “ECU Master” and “Hacked” HP Tuners’ Software**

14 Similarly, HPT is unable to determine whether or not it agrees or objects to Defendants’  
15 Motion In Limine (B) as presently set forth for the same reasons. As set forth above, there have  
16 never been any formal stipulation(s) from Defendants and the factual evidence sought to be  
17 excluded forms the basis of liability for the claims asserted. To the extent Defendants are  
18 stipulating to liability on one or more of Plaintiff’s specific causes of action, HPT may agree  
19 with this motion. However, more information is warranted beyond Defendants’ vague references  
20 to informal stipulations.

21 Plaintiff’s position on Defendants’ Motion In Limine (B) is conditioned upon  
22 Defendants’ formal stipulation and admission of liability pertaining to specific causes of action  
23 in Plaintiff’s First Amended Complaint for Injunctive Relief and Damages (Dkt. 35).  
24  
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**C. Defendants' Motion to Preclude Plaintiffs' Use, At Trial, Of Evidence Obtained In Other Litigation And Not Produced In This Action**

HPT objects to Defendants' Motion In Limine (C).

Defendants' Motion in Limine (C) seeks to exclude evidence which Defendants mischaracterize as "evidence obtained in other litigation and not produced in this action". Before turning to the misleading nature of this characterization, it bears note that the parties have previously exchanged proposed exhibit lists as required. The specific documents referenced in this motion are part of HPT's proposed exhibits and the issue of their admissibility will be addressed by the Court in due course during that process. This subject matter is most appropriately addressed during review of the parties' proposed exhibits, and is misplaced as a motion in limine.

However, equally important is for the Court to scrutinize the disingenuous claims contained in this motion. Defendants have never denied that *in this case* they received FRCP 34 requests to produce party communications and communications involving Kenneth Cannata ("Cannata"). *Defendants never produced* the emails exchanged between Defendant John Martinson and Cannata which most certainly were in *Defendants' custody and control* at all times relevant to this litigation. Despite Defendants' concealment, HPT was fortuitous to discover through other means of over 100 Martinson-Cannata emails.

Defendants' Motion in Limine (C) is curious in that it urges this Court to believe that Defendants have been "ambushed" by *their own emails*. This motion dishonestly flips reality on its head by alleging that Plaintiff violated FRCP 37(c)(1) simply by subsequently learning about Defendants' own concealed emails. In essence, Defendants now ask the Court to validate both their prior concealment and their present blame shifting.

1 Accordingly, Defendants' Motion In Limine (C) should be denied.

2 **D. Defendants' Motion to Preclude Expert Testimony That Goes Beyond Scope**  
 3 **Of Expert Reports**

4 HPT objects to Defendants' Motion In Limine (D).

5 Defendants' Motion in Limine (D) seeks to exclude the alleged supplementation of Dr.  
 6 Ernesto Staroswiecki's original expert report ("Report") by his September 3, 2019 Declaration in  
 7 Opposition to Defendants' Motion for Partial Summary Judgment (Dkt. 193-3) ("Staroswiecki  
 8 Declaration"). Defendants' primary argument is that this was proffered "on September 3, 2019,  
 9 long after the April 22, 2019 deadline for serving expert reports". (Dkt. 209, at 4). Plaintiff  
 10 disputes and denies that the Staroswiecki Declaration provides anything new, additional or  
 11 different. Rather, in all instances, it specifically refers to the Report and Dr. Staroswiecki  
 12 offered it based on his opinion and belief that Defendants mischaracterized and misstated his  
 13 opinions and conclusions in their Motion for Partial Summary Judgment.

14 Nevertheless, pursuant to FRCP 26(e)(2), HPT was not only permitted but under a duty to  
 15 supplement the report and to disclose same 30 days before trial pursuant to FRCP 26(a)(3)(B),  
 16 which Plaintiff did. This was entirely consistent with both FRCP 26 and case law interpreting  
 17 same. *See Sudre v. The Port of Seattle*, 2016 U.S. Dist. LEXIS 166882 (W.D. Wash. 2016).

18 Supplementaiton of the expert report is appropriate "if the party learns that in some  
 19 material respect the disclosure is incomplete or incorrect, and if the additional or corrective  
 20 information has not otherwise been made known to the other parties during the discovery process  
 21 or in writing." *Sudre*, 2016 U.S. Dist. LEXIS at ¶68. The supplementation requirement is not  
 22 intended to permit adding new opinions based on evidence available at the time the initial expert  
 23 report was due, and the Staroswiecki Declaration does not do so. Instead, it clearly references  
 24  
 25

1 his Report throughout and this supplementation was made purely for clarification and in  
 2 response to blatant, wholesale mischaracterizations of his opinions in Defendants' Motion for  
 3 Partial Summary Judgment. The Staroswiecki Declaration complies with FRCP 26(e). It is  
 4 little more than a summation of his Report, referencing opinions previously set forth and does  
 5 not introduce new opinions. Further, its imposition in this case is harmless and Defendants have  
 6 ample opportunity to cross-examine and/or raise objections at trial. *Id.* at ¶¶69-70.

7  
 8 While not expressly stated, it appears as if Defendants' Motion in Limine (D) goes  
 9 beyond simply trying to exclude the Staroswiecki Declaration, but also to preempt any and all  
 10 oral testimony which is not a verbatim reading of said Dr. Starswiecki's initial Report. While  
 11 the issue has not been expressly addressed in this District Court, other District Courts have been  
 12 explicit that experts are not limited to simply reading a report and that FRCP 26 permits an  
 13 expert during oral testimony to reasonably supplement, explain and elaborate on material  
 14 contained in a report. *See Gay v. Stonebridge Life Insurance Company*, 660 F.3d 58, 64 (1st Cir.  
 15 2011); *Muldrow ex rel. Muldrow v. Re-Direct, Inc.*, 493 F.3d 160, 167 (D.C. Cir. 2007);  
 16 *Thompson v. Doane Pet Care Co.*, 470 F.3d 1201, 1203 (6th Cir. 2006). Moreover, Defendants'  
 17 objection is premature and is being asserted without knowing, and merely assuming, what the  
 18 actual trial testimony in response to questioning might be.

19 Accordingly, Defendants' Motion In Limine (D) should be denied.

20  
 21 **E. Defendants' Motion to Exclude Non-Expert Testimony As To Trade Secrets  
 Purportedly Contained In HP Tuners' Source Code**

22 HPT objects to Defendants' Motion In Limine (E).

23 Defendants' Motion in Limine (E) is curiously framed in that it entirely mischaracterizes  
 24 the deposition testimony of Keith Prociuk ("Prociuk") in order to achieve its aims. Defendants  
 25

1 move to exclude anyone other than its expert, Dr. Staroswiecki, “to offer any evidence ... and  
2 must be precluded from relying on evidence other than the [Report] and testimony of its expert  
3 ... to support, if it can, its claim that Defendants’ software includes alleged trade secrets of HP  
4 Tuners”. (Dkt. 209, *at* 5). Defendants’ unusual basis for seeking to exclude HPT from offering  
5 first-hand knowledge and evidence of its *own source code* is by using a deposition testimony  
6 excerpt wherein Prociuk makes an unrelated deferral to Plaintiff’s expert regarding the content of  
7 *Defendants’ source code*. (Dkt. 209, *at* 4).

8  
9 This is an apples to oranges argument. Although Prociuk gave no testimony or indication  
10 of knowledge regarding Syked ECU Tuning’s source code content, this is entirely irrelevant as to  
11 the relevant personal knowledge he does possess as to his own HPT source code and the trade  
12 secrets contained therein. There is no just reason or basis to exclude Plaintiff from offering  
13 testimony regarding trade secrets contained in its own source code based on deposition  
14 questioning and testimony on an unrelated issue.

15 Accordingly, Defendants’ Motion In Limine (E) should be denied.

16 **F. Defendants’ Motion to Exclude Reference To, Or Admission Of, HP**  
17 **Tuners’ Source Code**

18 HPT objects to Defendants’ Motion In Limine (F).

19 Defendants attempt to exclude all reference to or admission of HPT’s source code based  
20 on the highly misleading allegation that it “should have been, but was not, disclosed to  
21 Defendants” and that “HP Tuners’ failure to make the source code available to Defendants is  
22 highly improper”. (Dkt. 202, *at* 5). Defendants’ claims in this regard are manufactured and  
23 baseless.

24 First, Defendants never requested production of all of HPT’s source code nor would that  
25

1 have been relevant or appropriate as all of HPT's source code is not at issue in this case. In fact,  
2 knowing that such a request for all of HPT's source code would be inappropriate, Defendants  
3 never even sent an FRCP 34 discovery request for such production. Instead, in Defendants' Fifth  
4 Set of Document Requests, Defendants only asked for "a copy of any and all source code  
5 developed by anyone at HP Tuners that you contend Defendants' copied and/or  
6 misappropriated". On October 4, 2018, HPT responded to Defendants' Fifth Set of Document  
7 Requests with objections. Moreover, at the time of the Fifth Set of Document Requests,  
8 Defendants were refusing to make their source code available for inspection, which made HPT  
9 incapable of responding to Defendants' document request as it was impossible to know what  
10 HPT source code had been misappropriated before analyzing Defendants' source code.

12 Subsequent to HPT's responses, Defendants required an Addendum to Protective Order  
13 be entered governing the production and review of source code in this matter. The parties filed a  
14 Stipulated Motion for Entry of an Addendum to Protective Order on November 7, 2018. (Dkt.  
15 117). On November 8, 2018, the Addendum to Protective Order ("Addendum") was entered by  
16 the Court. (Dkt. 118). In connection with the Addendum, the parties agreed that "discovery in  
17 this action was likely to involve production or disclosure of Highly Confidential material  
18 including source code files from both parties". (Dkt. 118, *at 1*). Pursuant to the Addendum, the  
19 "parties acknowledge[d] that additional protections beyond those prescribed in the governing  
20 Protective Order (Dkt. 39) [were] necessary". *Id.*

22 According to the Addendum, all source code(s) were required to be delivered to *the*  
23 *parties' respective experts*, not the Defendants or their counsel. In fact, Defendants mandated  
24 the entry of the Addendum and also that a protocol be implemented by which the reviewing party  
25 seeking disclosure of the source code files was required to identify its expert to the disclosing

1 party before any such production so that the disclosing party could object to the reviewing  
 2 party's expert before any review of source code files was commenced.

3 Now, unbelievably, Defendants contend that HPT should be precluded from introducing  
 4 evidence of its source code based on HPT's alleged failure to produce source code to Defendants  
 5 where Defendants were solely responsible for not having received the production. Defendants  
 6 demanded the implementation of the protocol set forth in the Addendum and that source code  
 7 shall only be produced to experts in this case but they failed to follow it as Defendants never  
 8 identified nor disclosed any expert in this case. Consequently, Defendants' not having received  
 9 HPT's source code was the result of their own choices in this litigation and their decision not to  
 10 engage an expert or comply with the express terms and provisions Addendum (which they  
 11 required in the first instance). Therefore, HPT did not withhold anything and should not be  
 12 precluded from introducing evidence of its source code at the trial of this matter.  
 13

14 Accordingly, Defendants' Motion In Limine (F) should be denied.

15 **G. Defendants' Motion to Exclude Identification Of Alleged "Trade Secrets"**  
 16 **Beyond Or In Greater Detail Than They Have Been Identified To Date**

17 HPT objects to Defendants' Motion In Limine (G).

18 HPT has set forth multiple causes of action, with its trade secrets and Defendants'  
 19 misappropriation of same being arguably the most central facts of this litigation. Put simply,  
 20 Plaintiff's trade secrets are what this case is all about and the mere suggestion that HPT cannot  
 21 present evidence of its trade secrets is tantamount to prohibiting Plaintiff from putting on its case  
 22 or having its day in court. Moreover, Defendants' assertions are simply false and their claimed  
 23 case support is similarly deceitful.

24 The argument put forth by Defendants is fabricated, false, and baseless. First, throughout  
 25



1 this litigation in both discovery and various pleadings, HPT has specifically identified its trade  
2 secrets which include, but are not limited to, HPT's source code, HPT's parameters list, HPT's  
3 implementation of algorithms, HPT's key generator, HPT's MPVI communication protocol and  
4 various HPT files, programs, documents, materials and information on a Flash Drive which  
5 Sykes-Bonnett destroyed in the midst of these proceedings. In addition, by virtue of the  
6 Defendants' admitted spoliation of the Flash Drive and the Order granting sanctions relating to  
7 Defendants' discovery misconduct in this regard, HPT is specifically entitled to adverse  
8 inferences regarding the nature of the information that was contained on the Flash Drive.  
9 Furthermore, the Expert Report of John R. Bone, CPA, CFF dated April 22, 2019 and the Expert  
10 Report of Dr. Ernesto Staroswiecki, Ph.D, P.E. dated April 22, 2019 detail the trade secrets at  
11 issue in this matter. Lastly, as noted above, to the extent Defendants have made the dishonest  
12 claim that HPT's source code was never delivered to them it was purely the result of their  
13 decisions in terms of how to litigate this matter. Consequently, HPT has properly identified the  
14 trade secrets at issue in this matter and should not be precluded from offering evidence of the  
15 same at the trial of this matter.  
16

17 To ostensibly support exclusion of factual evidence central to this case, Defendants have  
18 pulled language directly from the case of *Inteum Co., LLC v. National University of Singapore*,  
19 371 F.Supp.3d 864, 877 (W.D. Wash. 2019) along with citing the three (3) other cases the  
20 *Inteum* opinion cites following Defendants' excerpted quote. *See Inteum*, 371 F.Supp.3d at 877  
21 *citing Robbins, Geller, Rudman & Dowd, LLP v. State*, 179 Wn. App. 711, 328 P.3d 905, 911  
22 (Wash. Ct. App. 2014), *Belo Mgmt. Servs., Inc. v. Click! Network*, 184 Wn. App. 649, 343 P.3d  
23 370, 375 (Wash. Ct. App. 2014); *Woo v. Fireman's Fund Ins. Co.*, 137 Wn. App. 480, 154 P.3d  
24 236, 240 (Wash. Ct. App. 2007).  
25

1           However, neither the *Inteum* case, nor Defendants' excerpt, have anything to do with the  
 2           admissibility or exclusion of trade secret evidence. In the context of a motion for summary  
 3           judgment, this Court discussed a plaintiff's burden in establishing a trade secrets claim under the  
 4           Washington Uniform Trade Secrets Act ("WUTSA"). Specifically, this Court stated that "a  
 5           plaintiff seeking to establish a trade secrets claim under [the WUTSA] has the burden of proving  
 6           that legally protectable secrets exist ... [and] must establish (1) that the information derives  
 7           independent economic value from not being generally known or readily ascertainable to others  
 8           who can obtain economic value from knowledge of its use and (2) that reasonable efforts have  
 9           been taken to maintain the secrecy of the information." *Inteum*, 371 F.Supp.3d at 876-77. The  
 10          Court's discussion of WUTSA claims proceeded with what it means for information to have  
 11          independent economic value, what are reasonable efforts to maintain secrecy, and that a  
 12          "plaintiff bears the burden of demonstrating that the alleged trade secrets are novel and unique".  
 13          *Id.* at 877. Only then does Defendants' non-contextual excerpt appear stating that "the alleged  
 14          unique, innovative, or novel information must be described with specificity and, therefore,  
 15          'conclusory' declarations that fail to 'provide concrete examples' are insufficient to support the  
 16          existence of a trade secret." (Dkt. 209, p. 7).

17  
 18          All of this District Court's discussion in *Inteum* revolves around what a plaintiff must do  
 19          to prove a WUTSA claim, with no applicability on the issue of exclusion of trade secret  
 20          evidence at trial. Similarly, the *Robbins*, *Belo*, and *Woo* cases (cited in *Inteum*) do not involve  
 21          the admissibility or exclusion of trade secret evidence. Here, at trial, HPT will present specific  
 22          and detailed evidence of its trade secrets which are at issue in this case and Defendants'  
 23          misappropriation of same. Consequently, Defendants' Motion in Limine (G) to exclude the  
 24          introduction of evidence of HPT's trade secrets at trial should be denied.  
 25

1 Dated this 7th day of October, 2019

Respectfully submitted,

2  
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**CERTIFICATE OF SERVICE**

I hereby certify that on October 7, 2019, I caused the foregoing to be electronically with the Clerk of Court using the **CM/ECF system** which will electronically send Notice to all Counsel of Record.

MARKS & KLEIN

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